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NTSB Order No. EA-4288

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 12th day of November, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. THOMAS A. BRZOSKA, Respondent.	Docket SE-13245

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge Jerrell R. Davis at the conclusion of a hearing held in this case on November 3, 1993.[1] In that decision, the law judge affirmed the Administrator's order revoking respondent's airline transport pilot certificate based on his admitted felony drug conviction, and his failure to

[1] Attached is an excerpt from the hearing transcript containing the oral initial decision.

disclose that conviction on two applications for airman medical certification, in alleged violation of section 609(c) of the Federal Aviation Act and 14 C.F.R. 67.20(a)(1).[2] For the reasons discussed below, respondent's appeal is denied and the initial decision upholding the revocation is affirmed.

Respondent was convicted, on June 13, 1985, of aiding and abetting in the possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(b)(1)(c) and 18 U.S.C. 2(a).[3]

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[2] Section 609(c) of the Federal Aviation Act (49 App. U.S.C. 1429(c)) [now recodified as 49 U.S.C. 44710(b)] provided, in pertinent part:

> (c)(1) The Administrator shall issue an order revoking the airman certificates of any person upon conviction of such person of a crime punishable by death or imprisonment for term exceeding one year under a State or Federal law relating to a controlled substance (other than a law relating to simple possession of a controlled substance), if the Administrator determines that (A) an aircraft was used in the commission of the offense or to facilitate the commission of the offense, and (B) such person served as an airman, or was on board such aircraft, in connection with the commission of the offense or the facilitation of the commission of the offense. The Administrator shall have no authority under this paragraph to review the issue of whether an airman violated a State or Federal law relating to a controlled substance.

Section 67.20(a)(1) provides as follows:

> **§ 67.20 Applications, certificates, logbooks, reports, and records: Falsification, reproduction, or alteration.**
>
> (a) No person may make or cause to be made --
> (1) Any fraudulent or intentionally false statement on any application for a medical certificate under this part.

[3] Although he pled guilty to a charge of aiding and abetting in the possession with intent to distribute less than 50 kilograms of marijuana, the record in this case establishes that respondent's offense actually involved transporting over 1,400

Respondent admitted his conviction, but denied that he served as an airman and was aboard the aircraft which was used to commit or facilitate this crime. Nonetheless, the Administrator established at the hearing -- through the testimony of three law enforcement agents directly involved in apprehending respondent and his criminal co-defendants, and several corroborating documentary and photographic exhibits -- that respondent was indeed on board the Piper Navajo aircraft which was used to transport marijuana from Mexico into the United States, and that he most likely was the pilot-in-command of that drug-running flight. Thus, stating that he was "overwhelmingly convinced" by the Administrator's essentially unrebutted evidence, the law judge concluded that section 609(c) mandates revocation of respondent's pilot certificate.

Regarding the falsification charge, respondent admitted that on two medical applications he filled out after the drug conviction here at issue[4] he answered "no" to item 21w, which asks whether the applicant has a "record of other [non-traffic] convictions." He denied, however, that those answers were fraudulent or intentionally false. But the law judge indicated that, in light of respondent's failure to testify on this point, he had no choice but to conclude that those incorrect answers were fraudulent or intentionally false, in violation of 14 C.F.R.

(..continued)
pounds of marijuana.

[4] The applications for medical certification were dated July 5, 1985 (less than one month after respondent's conviction) and August 11, 1986.

67.20(a)(1).

On appeal, respondent pursues a host of arguments and defenses, almost all of which were unsuccessfully raised before the law judge, and none of which are persuasive.

Several of respondent's arguments are based on the length of time which passed between February 1987, when the Administrator first learned of respondent's 1985 conviction, and his initiation of this enforcement action some five years later.[5] Specifically, respondent argues that this action is barred by: 1) the five-year statute of limitations contained in 28 U.S.C. 2462, pertaining to "enforcement of any civil fine, penalty, or forfeiture"; 2) the equitable principle of estoppel, in that the Administrator failed to take emergency action as allegedly required by agency policy,[6] and also issued respondent additional type ratings after learning of the conviction; 3) our stale complaint rule (49 C.F.R. 821.33); 4) the doctrine of laches; and 5) an internal FAA memorandum suggesting that a special enforcement effort focus on drug-related convictions occurring after a so-called "cutoff date" of January 1, 1986.

The Administrator does not attempt to explain his five-year delay in initiating this enforcement action. He correctly argues, however, that this delay does not mandate dismissal of

[5] A notice of proposed certificate action was issued in February 1992, and the order of revocation, which later served as the complaint in this proceeding, was served in July 1993.

[6] The Administrator's use or non-use of his emergency authority is a matter we do not review. Administrator v. Borregard, NTSB Order No. EA-3863 (1993).

the case for any of the reasons cited by respondent.[7] The five-year statute of limitations in 28 U.S.C. 2462 is inapplicable because this revocation action does not involve the enforcement of a "civil fine, penalty, or forfeiture." It has long been recognized that certificate revocation is a remedial sanction.[8] Nor is the Administrator estopped from pursuing this action because he issued respondent additional type ratings, since the Administrator's allegation that respondent lacks the care, judgment, and responsibility required of a certificate holder is unrelated to his technical qualifications. We have held that the only statute of limitations, legal or equitable, that is applicable to these remedial proceedings is our own stale complaint rule.[9] And that rule does not foreclose the Administrator's pursuit of this case since it raises a legitimate issue of lack of qualifications.[10] Although we have recognized

[7] We note that all of these timeliness arguments were rejected by the law judge and the Board in Administrator v. McDaniel, NTSB Order No. EA-4189 (1994). The full Board's decision in that case was not issued until after briefing was completed in this case.

[8] Specht v. CAB, 254 F.2d 905 (8th Cir. 1958); Administrator v. Kolek, 5 NTSB 1437 (1986), aff'd, Kolek v. Engen, 869 F.2d 1281 (9th Cir. 1989).

[9] Administrator v. McDaniel, at 3. See also Administrator v. Anderson, citing Administrator v. King, 4 NTSB 1311, 1312 (1984) (Administrator's authority to revoke a certificate and the Board's authority to review that action derive from section 609 of the Federal Aviation Act and are not subject to any time limitation).

[10] Both respondent's drug conviction and his falsifications are matters which implicate a lack of qualifications. See Administrator v. Derrow, NTSB Order No. EA-3590 (1992); Administrator v. Adler, NTSB Order No. EA-4048 (1993); and

the potential availability of laches as a defense, that defense cannot succeed unless the respondent makes a showing that he suffered actual prejudice to his defense as a result of the delay.[11] Respondent made no such showing.

As for the internal FAA memorandum proposing a January 1, 1986 "cutoff date" for convictions, we have previously rejected the notion that the Administrator or the Board is in any way bound by the contents of this internal memorandum.[12] Moreover, we note that in subsequently-published statements of agency policy, the FAA in fact adopted an earlier "cutoff date" of February 17, 1984 (well before respondent's conviction).[13] And furthermore, as with many of respondent's arguments in this case, his line of reasoning ignores the fact that neither the Administrator nor the Board has any discretion to forego revocation under section 609(c), as that statute **requires** certificate revocation in cases, such as this, where a respondent served as an airman or was on board an aircraft which was used in the commission of a felony drug offense.

(..continued)
Administrator v. Shrader 6 NTSB 1400 (1989).

[11] Administrator v. Shrader, 6 NTSB 1400 (1989).

[12] Administrator v. McDaniel, NTSB Order No. EA-4189 at 4 (1994); Administrator v. Sue, NTSB Order No. EA-3877 at 5, n.4 (1993).

[13] See the discussion in Administrator v. Bakhtiar, NTSB Order No. EA-4082 at 4-5 (1994). Moreover, as noted in Bakhtiar, the FAA specifically reserved the prerogative to take action in aggravated cases that fell outside the time period.

Respondent also claims that the law judge erred in upholding the revocation under section 609(c) of the Federal Aviation Act for several additional reasons. First, he asserts that the Administrator is bound by the terms of the conviction itself and, because there is no language in the conviction indicating that respondent was on board an aircraft used in the commission of the offense, the Administrator was barred from attempting to prove this fact, and the law judge erred in admitting exhibits and testimony on this point. Respondent has misconstrued the statute. While section 609(c) does preclude the Administrator from reviewing "the issue of whether an airman violated a . . . law relating to a controlled substance" (i.e., the validity of the conviction itself), it explicitly contemplates that the Administrator will determine whether an aircraft was used in the commission or facilitation of the offense, and whether the airman "served as an airman, or was on board such aircraft, in connection with the commission [or facilitation] of the offense." These facts are commonly proved, as they were in this case, through the testimony of law enforcement agents, indictments,[14] and other documents underlying the criminal conviction.

Accordingly, since it was entirely proper for the Administrator to introduce evidence of respondent's presence on

[14] We have held that allegations in the indictment which indicate that the respondent was an airman or was on board an aircraft used in the commission of a drug offense constitute sufficient prima facie proof on that point. Administrator v. Serra, NTSB Order No. EA-3938 at 4 (1993); Administrator v. Beahm, NTSB Order No. EA-3769 at 4 (1993).

board the aircraft used in the commission of the drug offense in order to show a violation of section 609(c), respondent's argument that this constituted impermissible evidence of violations not charged in the complaint (specifically 14 C.F.R. 91.19(a) and 61.15(a)), must also fail.

Nor is there any doubt that the Administrator's evidence established that respondent was in fact on board the aircraft which was used to transport some 1,400 pounds of marijuana from Mexico into the United States. The testimony of the U.S. Customs agent who arrested respondent, and two other law enforcement officials involved in the year-long investigation and surveillance which culminated in respondent's arrest, unequivocally established that respondent was in the pilot's seat of the aircraft during the drug-running flight.

Respondent makes much of the fact that he was not actually seen to emerge from the aircraft at the dry lake bed where the marijuana bales were off-loaded into trucks, and that none of the three law enforcement agents who testified personally field-tested the bales to conclusively determine that they were marijuana.[15] It is undisputed, however, that immediately after the bales were off-loaded, the aircraft flew from the dry lake bed to a nearby airport where respondent was apprehended as he

[15] Respondent's arguments in this respect seem to be based on an incorrect assumption that the Administrator was required to prove these facts beyond a reasonable doubt. However, the applicable standard of proof in our administrative proceedings is "a preponderance of the reliable, probative, and substantial evidence." 49 C.F.R. 821.49(a).

exited from the pilot seat of the aircraft. In addition, there was unrebutted testimony that odor and debris in the aircraft at the time of respondent's arrest was consistent with that of marijuana, and also that the bales which were off-loaded from the aircraft were in fact field-tested by qualified personnel and found to be marijuana.[16]

Respondent further argues that section 609(c) does not require revocation in this case because, according to respondent, he was convicted only of "simple possession" of marijuana. This argument is specious. While it is true that section 609(c) specifically excludes from its coverage convictions for "simple possession of a controlled substance," respondent's conviction was clearly not for "simple possession." He was convicted of "aiding and abetting in the possession *with intent to distribute* marijuana," in violation of 21 U.S.C. 841(b)(1)(C) and 18 U.S.C. 2(a). (Exhibit C-1, Second Superseding Information, and C-2, Judgment and Probation/Commitment Order, emphasis added.)[17]

Finally, with regard to the falsification charge, respondent argues that the violation cannot stand because of United States

[16] Although respondent claims that these facts could not have been established without improper questioning by the law judge, we note that the record contains ample support, even without the answers to the challenged questions. Moreover, we disagree that there was anything improper in the law judge's questioning of these witnesses. We have considered all of respondent's allegations of law judge bias and impropriety, and find them to be completely meritless.

[17] "Simple possession" is dealt with in another section of the United States Code (21 U.S.C. 844). Respondent was not charged with violating this section.

v. Manapat, 928 F.2d 1097 (11th Cir. 1991), in which the Court held, in a 2 to 1 decision, that the question here at issue (question 21w) was so fundamentally ambiguous as to preclude a conviction under 18 U.S.C. § 1001 as a matter of law. However, we have already expressed our disagreement with the majority's conclusion in that case, and indicated that in our view the questions relating to traffic convictions and other convictions are not confusing in any respect that would likely cause persons of ordinary intelligence to entertain any genuine doubt as to their meaning. Administrator v. Barghelame and Sue, NTSB Order No. EA-3430 (1991). We further stated that we do not consider the holding in Manapat to be controlling in our certificate proceedings, and we will continue to rely on our law judge's determinations as to whether a particular respondent's false answer in response to those questions was deliberate or intended to deceive. Id.[18] Despite respondent's stated disagreement with our holding in Barghelame and Sue, we see no reason to alter our position on this point.

In light of respondent's failure to offer any explanation for his incorrect answer to question 21w on the medical applications, and our holding that a falsely-answered medical

[18] In upholding a certificate revocation based in part on a charge of intentional falsification, the Ninth Circuit has recognized (as the Manapat majority itself pointed out) that Manapat speaks only to criminal prosecutions, and does not preclude certificate actions, such as this one, based on an applicant's false statements on an application for medical certification. Sue v. NTSB, No. 93-70456, slip op. at 5 (9th Cir. Sept. 20, 1993).

application constitutes sufficient circumstantial proof of a respondent's intent to falsify,[19] the law judge properly affirmed the falsification charge.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The initial decision is affirmed; and

3. The revocation of respondent's pilot certificate shall commence 30 days after the service of this opinion and order.[20]

HALL, Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.

[19] Administrator v. Juliao, NTSB Order No. EA-3087 (1990).

[20] For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).